

FEDERAL CIRCUIT COURT OF AUSTRALIA

*SALLOUM v MINISTER FOR IMMIGRATION
& ANOR*

[2016] FCCA 1718

Catchwords:

MIGRATION – Administrative Appeals Tribunal (Migration & Refugees Division) – Partner Temporary (Class UK) visa – Partner (Residence) (Class BS) visa – show cause hearing – whether the Tribunal failed to comply with the statutory scheme – whether the applicant was denied procedural fairness – no arguable jurisdictional error identified – application dismissed.

Legislation:

Migration Act 1958 (Cth), ss.359A, 359C, 476
Migration Regulations 1994, Sch.2, cl.820.221
Federal Circuit Court Rules 2001 r.44.12

Cases cited:

Spencer v Commonwealth of Australia [2010] HCA 28; (2010) 241 CLR 118

Applicant:	YOUSSEF SALLOUM
First Respondent:	MINISTER FOR IMMIGRATION & BORDER PROTECTION
Second Respondent:	ADMINISTRATIVE APPEALS TRIBUNAL
File Number:	SYG 1970 of 2015
Judgment of:	Judge Street
Hearing date:	8 July 2016
Date of Last Submission:	8 July 2016
Delivered at:	Sydney
Delivered on:	8 July 2016

REPRESENTATION

The applicant appeared in person

Solicitors for the First
Respondent:

Ms R Krishnan
Australian Government Solicitors

ORDERS

- (1) The application is dismissed pursuant to r.44.12 of the *Federal Circuit Court Rules 2001*.
- (2) The applicant pay the costs of the first respondent fixed in the amount of \$2675.
- (3)
- (4)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT SYDNEY

SYG 1970 of 2015

YOUSSEF SALLOUM

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

1. This is an application for a Constitutional writ within the Court's jurisdiction under s.476 of the *Migration Act 1958* in respect of a decision of the Tribunal made on 15 June 2015 affirming the decision of the Delegate not to grant the applicant a Partner (Temporary) (Class UK) visa and Partner (Residence) (Class BS) visa. The applicant is a citizen of Syria and travelled to Australia on a subclass 676 tourist visa, arriving on 10 May 2008.
2. The applicant departed Australia on 4 August 2008. During the applicant's visit, the applicant met the sponsor of his subclass 300 prospective marriage visa. This was not the sponsor of the applicant's partner visa. When the applicant returned to Australia, he was told by the sponsor of his subclass 300 visa that she no longer wished to marry

him and he remained in Australia and met the current sponsor of his partner visa application, who is an Australian citizen.

3. They married on 23 October 2009. The partner visa application was lodged on 30 October 2009. A Delegate refused the application on 29 September 2010, finding that the applicant and the sponsor were not in a genuine and continuing relationship. A differently constituted Tribunal remitted the matter for further consideration on 8 November 2012.
4. On 18 November 2013, the Department received an undated letter from the sponsor informing the partner that she and the applicant had separated from around 22 November 2012 and that she is no longer sponsoring the applicant. On 3 December 2013, the Department informed the applicant that it had received the information that he was not living in a continuing spousal relationship with the sponsoring spouse and invited the applicant to provide information on whether he had grounds to remain in Australia. No response was received.
5. Accordingly, on 28 April 2014, the applicant's partner visa application was again refused on the basis that he did not satisfy cl.820.221 of Schedule 2 of the Regulations. That decision was affirmed by the Tribunal on 15 December 2014. On 21 April 2015, by consent another Judge of this Court remitted the matter for further consideration on the basis that there had been an error in relation to s.359A of the *Migration Act 1958* in respect of the letter dated 18 November 2013.
6. On 25 May 2015, the reconstituted Tribunal wrote to the applicant's authorised representative identified in his review application inviting the applicant to provide information in response to the letter received from the former sponsoring spouse. That letter had up, in bold, a warning in relation to what would occur if the applicant failed to provide any response, and said:

You will lose any entitlement you might otherwise have had under the Migration Act to appear before the Tribunal to give evidence and present arguments.

7. No response was received by the Tribunal and the Tribunal accordingly, consistent with s.359C(2), proceeded to determine the application without providing the applicant with a hearing. The

Tribunal found that it was unable to be satisfied that, at the time of the decision, the parties were in a spousal relationship. The Tribunal found that the applicant did not meet the alternative criteria under cls.820.221(2), (3) or (4).

8. The Tribunal noted that having found that the applicant did not meet the requirements for a grant of a subclass 820 visa, it had considered whether the applicant satisfied the criteria for the grant of a subclass 801 visa. The Tribunal found that as the applicant was not the holder of a subclass 820 visa at the time of the decision, the applicant does not meet the criteria under cl.801.22(2)(a) for the grant of a subclass 801 visa. It was for these reasons that the Tribunal affirmed the decision of the delegate.
9. On 20 August 2015, a Registrar of the Court made orders providing the applicant with an opportunity to file an amended application, affidavit evidence and submissions. No such documents were filed. On 8 April 2016, this Court made orders fixing the matter today for a show cause hearing under r.44.12 of the *Federal Circuit Court Rules 2001* and provided the applicant with a further opportunity to file an amended application, affidavit evidence and submissions. No such documents were filed.
10. The Court explained to the applicant that the nature of a show cause hearing was to determine whether there was any arguable case that the Tribunal's decision was affected by a relevant legal error. The Court explained that the relevant legal error had to be either an excess of statutory power by the Tribunal or a denial of procedural fairness to the applicant. The Court explained that if satisfied that there is an arguable case that the Tribunal's decision was affected by a relevant legal error it would fix the matter for a hearing on another day. The Court explained that if it was not satisfied that the Tribunal's decision was affected by any arguable case of relevant legal error, the application would be dismissed.
11. The Court explained to the applicant that it would identify the evidence and then hear submissions from the applicant, then the solicitor for the first respondent, and then from the applicant in reply. The applicant confirmed that he understood what was said by the Court.

12. The grounds of the application are as follows:
- 1. I provided to the Migration Review Tribunal information as to respond to their letter of 25 May 2015. The Tribunal failed to ask me to attend an interview and give evidence.*
 - 2. I do not agree with the decision Record of 15 June 2015 stating that 'the Tribunal has received no response to that invitation as of the date of this decision.'*
 - 3. The Tribunal failed to accord me fairness.*
13. The applicant did not seek to develop any submissions in-chief, and the solicitor for the first respondent addressed why each of the grounds failed to identify any arguable jurisdictional error. The solicitor for the first respondent identified that there was no evidence to support a response to the letter dated 25 May 2015 sent by the Tribunal and that, in those circumstances, the Tribunal, under s.359C(2) was not under an obligation to invite the applicant to attend a hearing to give evidence and that ground 1 accordingly failed to identify any arguable jurisdictional error.
14. The solicitor for the first respondent submitted that ground 2 is merely disagreement with the adverse finding of the Tribunal and did not identify any jurisdictional error.
15. The solicitor for the first respondent submitted that ground 3 was a generalised allegation and, insofar as it relied upon the failure to provide the applicant with an opportunity to give evidence, the Tribunal was not required to provide such an opportunity because of s.359C(2). Accordingly, the solicitor for the first respondent submitted that there was no jurisdictional error.
16. The Court then invited the applicant to identify whether he wished to give oral evidence in support of there being a response to the letter of 25 May 2015. The applicant said that he did not think that he had submitted a reply or anything. The applicant declined the invitation to give any oral evidence. Nothing was said by the applicant from the bar table to identify any arguable jurisdictional error. I accept the submissions of the first respondent that ground 1 fails to identify any arguable jurisdictional error.

17. I am satisfied that the Tribunal was entitled under s.359C(2) to proceed to make a decision on the review without taking any further action to obtain the applicant's views on the information. I find it was reasonable for the Tribunal to do so. Ground 1 fails to identify any arguable jurisdictional error.
18. I accept the first respondent's submission that ground 2 fails to identify any arguable jurisdictional error.
19. The disagreement with the decision does not identify any relevant legal error and no evidence has been adduced of any response to the letter dated 25 May 2015. In this regard, the applicant was the subject of two orders by the Court providing an opportunity to put on affidavit evidence, as well as having explained to him an opportunity to adduce oral evidence at the hearing. Ground 2 fails to make out any arguable jurisdictional error.
20. In relation to ground 3, the generalised allegation does not identify any denial of procedural fairness. To the extent that ground 3 was intended to raise the issue of the applicant not having the opportunity to give evidence, for the reasons already given, the Tribunal was entitled to proceed under s.359C(2) to make a decision on the review without taking any further action to obtain the applicant's views on the information. Ground 3 fails to identify any arguable jurisdictional error.
21. The application fails to disclose any arguable case. I am satisfied that this is an appropriate matter in which to exercise the Court's powers under r.44.12 of the *Federal Circuit Court Rules 2001*. I take into account the principles and caution in *Spencer v Commonwealth of Australia* (2010) 241 CLR 18. I am satisfied this is an appropriate matter to dismiss under r.44.12 of the *Federal Circuit Court Rules 2001*. The application is dismissed under r.44.12 of the *Federal Circuit Court Rules 2001*.

I certify that the preceding twenty (20) paragraphs are a true copy of the reasons for judgment of Judge Street

Date: 19 July 2016